

***United States Court of Appeals
for the Second Circuit***

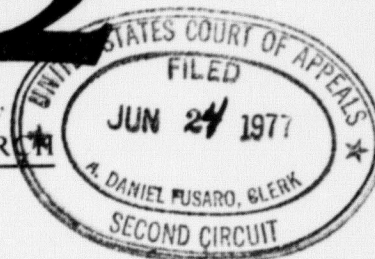


**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-6052

To be argued by
THOMAS A. CHURCH



In The

United States Court of Appeals

For The Second Circuit

Bpls

HUI, YING LAI (A17 540 719) and SHEK, LAP KIN (A15 196 208),

Plaintiffs-Appellants,

vs.

MAURICE F. KILEY, as District Director for the Immigration and Naturalization Service, New York District, United States Department of Justice,

Defendant-Appellee.

PETITION FOR REHEARING AND SUGGESTION OF
REHEARING IN BANC

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TABLE OF CITATIONS

Rules Cited:

Federal Rules of Appellate Procedure:

Rule 35(b)	1
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HUI, YING LAI
and
SHEK, LAP KIN

(A17 540 719)

(A15 196 208)

Plaintiffs-Appellants,

Civil Action No.

vs.

77 Civ. 6052

MAURICE F. KILEY, as District Director for
the Immigration and Naturalization Service,
New York District, United States Department
of Justice,

Defendant-Appellee.

PETITION FOR REHEARING AND SUGGESTION OF
REHEARING IN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT:

The above named plaintiffs-appellants present this,
their petition for rehearing and suggestion of rehearing in banc,
made pursuant to Rules 35(b) and 40 of the Federal Rules of
Appellate Procedure, in the above entitled cause, and, in
support thereof, respectfully show:

I.

By letter dated June 1, 1977, Mr. Robert S. Groban,
Jr., Special Assistant United States Attorney, made a belated
request that this Court render a written opinion in this case
(Exhibit #1, annexed), because of the novelty and importance of

the issues involved. The plaintiffs-appellants agree and join in this request for a written opinion. It is requested that the instant petition be granted in order to clarify those issues which would be the subject of such an opinion.

II.

At the time of oral argument on May 24, 1977, Mr. Groban had previously indicated that he did not feel that the issues presented were of sufficient merit to warrant the filing of a brief, and in so doing, deliberately violated this Court's expedited scheduling order, to which the Government had previously consented. On appeal he had submitted a memorandum of law with a number of motions, requesting summary dismissal of this appeal since the issues presented were "frivolous". This Court permitted him to rely on his memorandum of law and one hundred and seventy (170) pages of unnumbered and unindexed material in lieu of a brief and appendix.

III.

Mr. Groban indicated, during oral argument before this Court, in answer to his honor, Judge Waterman's questions and suggestions (concerning non-reviewability of the District Director and the possibility that the matter could be relitigated on the merits), that he did not feel that a written opinion was necessary at that time. After argument this Court rendered an oral decision adverse to appellants.

IV.

Although Mr. Groban has consistently indicated throughout the entire course of this case that in his opinion the action was frivolous he now urges this Court to write an opinion:

"...because of the novelty of the asylum regulation and absence of meaningful case law construing its provisions, an opinion by this court would provide guidance to the District Courts in this and other circuits in adjudicating actions brought under this regulation..."

(Para. 2 of Mr. Groban's letter.)

Mr. Groban could not better demonstrate how unfair it is to label an adversary's cause "frivolous". (See Point VI of appellants' brief, pp. 22-24.)

V.

It is difficult to determine what it is that Mr. Groban expects in a written opinion. He has advanced a number of unprecedented theories on administrative law,^{*} concerning for example, the non-reviewability of the District Director, and lack of adequate notice in violation of the Service's regulations. His memorandum of law contains a long discourse on the plenary power of Congress to discriminate legislatively in immigration matters, although the argument on discrimination in this case was based upon the discriminatory acts of the local

* Under Point I of Mr. Groban's memorandum of law accepted in lieu of a brief: This Appeal is Frivolous, pp. 11-23.

District Director. Neither statute nor regulation has been challenged as being suspect. Certainly such arguments should not be adopted in a written opinion without further scrutiny.

VI.

This action was initiated in good faith, based on two (2) simple contentions: (1) inadequate notice under the regulations, and (2) discriminatory group treatment. (See Points I and II, appellants' brief, pp. 10-13.) Under the guise of "frivolous and dilatory" these issues were obsecured and never squarely confronted by Mr. Groban.

VII.

There is an aspect of "secret law" to the case which deserves some attention. The District Director's decisions were based in large part on information contained in portions of the aliens' files not readily available to them until long after the commencement of the action. The "no basis" form denials of the District Director certainly provide no clue as to what the asylum regulation is all about. Judge Knapp's memorandum of law will not be published. The oral decision of this Court will not be published. More than eighty (80) Chinese applicants will have run almost the entire gamut of administrative procedure and judicial review and their cases will be disposed of without ever having seen the legal light of day. Not one (1) published word will appeal in print, in any legal journal or otherwise to enlighten anyone, the Chinese applicants, interested attorneys

or the courts concerning the matter.

VIII.

By letter dated June 7, 1977 (Exhibit #2, annexed), the appellants agreed that a written opinion should be rendered by this Court and suggested a rehearing in banc. In support of this petition we respectfully reaffirm the position taken in that letter. Attention is further drawn to (1) the appellants' brief, (2) Mr. Groban's memorandum of law and motions for summary affirmance, and (3) the appellants' affidavit in opposition thereto.

IX.

The Immigration Service is preparing to deport a number of the Chinese applicants, commencing on June 15, 1977. It is respectfully requested that their deportations be stayed until this Court decides whether it will render a written opinion, or until a determination is made on this petition.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing and suggestion of rehearing in banc be granted.

Thomas A. Church
Thomas A. Church

Attorney for Petitioner
and Plaintiffs-Appellants.

Certificate of Counsel

I, Thomas A. Church, attorney for appellants, do hereby certify that the foregoing petition is presented in good faith and not for purpose of delay.

Thomas A. Church
Thomas A. Church

EXHIBIT 1 - LETTER FROM ROBERT S. GROBAN, JR. TO PANEL,
SECOND CIRCUIT DATED JUNE 1, 1977

United States Department of Justice

(pp. 7-8)



ADDRESSES REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF NEW YORK

ONE ST. ANDREW'S PLAZA

NEW YORK, NEW YORK 10007

June 1, 1977

RSG:amm

76-2247

Honorable Ellsworth VanGraafeiland
Honorable Sterry R. Waterman
Honorable William O. Mehrrens

United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Hui, et al., v. Kiley
Docket No. 77-6052

Honorable Sirs:

On Tuesday, May 24, 1977, this panel orally affirmed the District Court's decision in this action pursuant to Section 0.23 of the Rules of the United States Court of Appeals for the Second Circuit. We respectfully request that a brief per-curiam opinion, consistent with the Court's oral decision or affirming the District Courts conclusion, be entered in this action. We believe that a written opinion, unrestricted by Section 0.23's rule against citing the Court's statements in this action in unrelated cases, would be useful for several reasons.

Initially, because of the novelty of the asylum regulation and absence of meaningful case law construing its provisions, an opinion by this court would provide guidance to the District Courts in this and other circuits in adjudicating actions brought under this regulation. In addition, such an opinion might act as a deterrent to help



RSG:amm
76-2247

Hon. Ellsworth VanGraafeiland -2- June 1, 1977

reduce the increasing amount of immigration litigation generated by aliens, like appellants, who institute these actions solely to delay their deportation. Finally, as Exhibit 3, Exhibit A of the affidavit of Robert S. Groban, Jr., dated May 5, 1977 and submitted in support of the defendant's motion for summary affirmance reflects, a substantial number of aliens with immigration histories like appellants' have instituted actions similar to this one in which they have agreed to be governed by the results of this case. A written opinion by this Court not only would facilitate the disposition of these cases, it would also deter these aliens from commencing more frivolous litigation and would help the courts summarily dispose of such litigation if instituted.

Respectfully yours,

ROBERT B. FISKE, JR.
United States Attorney

By: Robert S. Groban, Jr.
ROBERT S. GROBAN, JR.,
Special Assistant United States Attorney
Telephone: (212) 791-0021

cc: Thomas A. Church, Esq.
94 Bayard Street
New York, New York 10013

EXHIBIT 2 - LETTER FROM THOMAS A. CHURCH TO PANEL, SECOND CIRCUIT
DATED JUNE 7, 1977 (pp. 9-11)

THOMAS A. CHURCH
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94 BAYARD STREET
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RECTOR 2-9237

譚勝堂律師事務所

June 7, 1977

Honorable Ellsworth VanGraafeiland
Honorable Sterry R. Waterman
Honorable William O. Mehrtens

United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Hui, et al., v. Kiley. Docket No. 77-6052
Suggestion for Rehearing Under Rule 35(b)
of the Federal Rules of Appellate Procedure.

Dear Sirs:

I wholeheartedly agree with Mr. Groban's request, as stated in his letter of June 1, 1977, that a written opinion should be rendered in this case.

It is suggested to this Court however, that under the circumstances, a hearing or rehearing in banc, as provided under Rule 35(b) of the Federal Rules of Appellate Procedure, is appropriate since the Government now confirms the novelty and importance of the issues involved, and for further reasons stated below.

Mr. Robert S. Groban, Jr., Special Assistant United States Attorney, at the time of oral argument, on May 24, 1977, did not feel that the issues presented were of sufficient merit to warrant the filing of a brief, thereby deliberately violating this Court's expedited scheduling order, to which the Government had consented. Further, Mr. Groban indicated, during oral argument before this Court, in answer to his Honor, Judge Waterman's questions and suggestions (concerning the non-reviewability of the District Director and the possibility that the matter could be

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relitigated on the merits), that he did not feel that a written opinion was necessary at that time.

Mr. Groban has consistently indicated that in his opinion this action was "frivolous".

Now, Mr. Groban urges this Court to write an opinion "...because of the novelty of the asylum regulation and absence of meaningful case law construing its provisions an opinion by this Court would provide guidance to the District Courts in this and other circuits in adjudicating actions brought under this regulation..." Again, I wholeheartedly agree.

However, it is difficult to determine what it is that Mr. Groban expects in a written opinion. Should I remain mute I might well be a party to what may prove to be unprecedented principles of administrative law, concerning for example, the non-reviewability of the District Director, and lack of adequate notice in violation of the Service's regulations. Some opportunity should be provided for Mr. Groban to further clarify the matter, and an opportunity provided for the appellants to respond.

Frankly, may your honors please, this action was initiated in good faith, based on two (2) simple contentions: (1) inadequate notice under the regulations, and (2) discriminatory group treatment. Under the guise of "frivolous and dilatory" these issues were obscured and never squarely confronted by Mr. Groban.

Then there is the aspect of "secret law". The District Director's decisions on the applications were based in large part on information contained in portions of the aliens' files not readily available to me until long after the commencement of the action.

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The "no basis" form denials certainly provide no clue as to what the regulation is all about. Judge Knapp's memorandum of law will not be published. The oral decision of this Court will not be published. In short, eighty (80) or more Chinese applicants will have run the entire gamut of administrative procedure and almost the entire gamut of judicial review and their cases will be completely disposed of without ever having seen the legal light of day. Not one (1) published word will appear in print, in any legal journal or otherwise, to enlighten anyone, the Chinese applicants, interested attorneys or the courts, concerning the matter. I wholeheartedly join Mr. Groban in his belated request for a written opinion.

However, in the meantime, the Immigration Service is preparing to deport a number of the Chinese applicants on June 15, 1977. Rule 35(b) does not of itself provide for a stay of the mandate. It only seems fair that some provision be made for these men by either a stay or withdrawal of the mandate pending a decision by the Court of Mr. Groban's request or until such time as an opinion is written and handed down by this Court.

Since the requested relief may be granted sua sponte, and because of the urgency of the situation, it is the sincere hope of the appellants that the mode of this application will be excused.

Respectfully yours,

Thomas A. Church

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cc: Robert S. Groban, Jr.
Special Assistant United States
Attorney

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②

COPY RECEIVED

Robert B. Fiske Jr.
UNITED STATES ATTORNEY

6/13/77

Marian L. Bryant